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IN THE

Supreme Court of the United States

October Term, 1966

NO. 502

RUSSELL H. SITTON, ET UX, *Petitioners,*

v.

AMERICAN TITLE CO. OF DALLAS, ET AL.,
Respondents

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI WITH PRAYER FOR ALTERNATIVE RELIEF

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Your petitioners, Russell H. Sitton and wife, Barbara J. Sitton respectfully petition for rehearing as follows:

I.

Petitioners ask that the Court grant rehearing of its order of December 5, 1966 denying their petition for a writ of certiorari.

II.

In the alternative, petitioners ask that certiorari be granted limited solely to the question whether petitioners are entitled to indemnity for their debt to the United States, the matter being of great importance inasmuch as more than six million homes have been financed under the Veteran's Loan Guaranty Program.

III.

In the further alternative, petitioners ask that certiorari be granted limited solely to Question 3 of their petition (page 3, 23-27); that is, disregarding the seventh amend-

ment question, is the judgment of the Texas Courts so fundamentally unfair as to violate the Fourteenth Amendment?

IV.

In the further alternative, petitioners ask that the judgment of the Texas Court of Civil Appeals be vacated and that the cause be returned to that Court for any further proceedings deemed appropriate with request that separate and specific findings of fact and of law be entered.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

The plaintiffs were a veteran and his wife, the defendants were obvious fiduciaries, the cause of action was for forgery, no less.

The jury saw and heard the witnesses including a government agent relating the defendants' own admissions. The verdict was "guilty."

The Court of Civil Appeals said: "For the purposes of this opinion, we shall assume" that the forgery occurred. Nevertheless, the jury verdict will be overturned, we grant you nothing, not even nominal damages and assess you with all costs of this proceeding. *Your Constitutional rights have not been violated.*

This Court has said: "Certiorari denied;" for what reason, we do not know.

We have read the opinion of the Court below many times, and the grounds of the Court's ruling remain, at least to us, obscure. It is the province of the Court, particularly the appellate courts, to declare the law. Surely, if there is some principle of state law which discharges these fiduciaries from liability where the evidence discloses that they have misrepresented a real estate transaction to a G.I. couple with 8th and 10th grade educations and have altered the papers behind their backs, it should be clearly and succinctly stated.

The failure of a court to rule, the refusal of a court to rule, or the entry of rulings on obscure, superficial or non-existent grounds constitutes the denial of due process when the procedure departs from those fundamental notions of fair play and justice that lay at the root of our system of laws. *Postal Telegraph & Cable Co. v. Newport,* 247 U.S. 464; *Shuttlesworth v. Birmingham,* 15 L.Ed.2d 176.

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry." *Truax v. Corrigan,* 257 U.S. 312. Counsel are confident that the Court below is well qualified to deliver much more definitive opinions. We can only speculate as to the cause of its failure to do so in the instant case. It is submitted that "the judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a mere personal judgment." *Malinski v. New York,* 324 U.S. 401, 417 (Concurring opinion).

However, petitioners do not believe that the Court undertook to rule on the law in this case. We find thirteen separate declarations of "no evidence" in the Court's opinion. There is ample evidence that a forgery occurred. The Court declared, "we shall assume" as much. Why then does it deny relief? One can only surmise. Possibly, the Court held that there was no proof of "concerted action," but how is this nebulous element of the tort defined? The opinion is silent. How is it to be proved? Hypothetically speaking, what witness could have testified to what state of facts whereby the existence or non-existence of this subjective and highly ephemeral element would have been transformed into a question of fact as to which reasonable men might differ and thereby create a jury issue? Compare *U.S. v. General Motors Corp.,* 16 L.Ed.2d 415.

Lay aside the Seventh Amendment question for a moment. Assume that the state courts have no obligation under the Fourteenth Amendment to observe the Seventh Amendment standards for the overturning of jury verdicts. Does this mean that they are free to proceed with no standards at all? Does this mean that the Courts may Constitutionally ignore unbiased third party testimony that "Moorman told me he had her do it and she told me she did it" (Testimony 403), and judiciously declare: "The trial court gave appellants every reasonable opportunity to make out a case.* * * They failed to do so?" (Opinion, see Pet'n. A-46).

It will be difficult to find a case where the Court below has gone as far as the case in hand in overriding jury findings. There is nothing to prevent the invasion of the jury's province by the judiciary other than self restraint. The power inevitably increases with its exercise. If jury trial is ever reduced to pure formalism with the Court free to override verdicts at will, the jury system will become the common man's nightmare instead of his refuge. A long and arduous trial before a jury will be only a preliminary to recovery. A man may lose his case either to the court or to the jury. He must convince both of the facts of his case in order to recover. His burden of proof is doubled.

This Court has held in a number of decisions, all at least thirty years old, that a state may Constitutionally abolish the civil jury. Contrary to respondents' position, such holdings are not authority for state courts to ignore jury verdicts or withhold judgment on a verdict at will. Due process requires not only fair and reasonable laws but the uniform and non-discriminatory application thereof. Petitioners ask for no more. *National Union, M.C.&S. v. Arnold*, 348 U.S. 37; *Griffin v. Illinois*, 351 U.S. 12.

If a state must follow fair and reasonable standards to evaluate and overturn jury verdicts, what measure of reasonableness must be employed? The common law standard spelled out in the Seventh Amendment is the most

logical standard. It is the historic standard, it is the only standard that marks the division between the authority of the Court and the jury with any clarity; the only standard that insures that jury verdicts will be meaningful. *The Supreme Court has never ruled on the Constitutional minimum standards under which state courts may override jury verdicts.* It appeared to us that the question would be reached in *Heider v. Michigan Sugar Co.*, No. 48 at this term, but the petitioner declared in his opposition to our motion for joint consideration that his case in no wise concerned the Seventh Amendment. The writ in that case has been dismissed.

While the question has never been answered, it has been presented a number of times. Within the past two years, the following petitions for certiorari appear to have all presented the contention that the state court violated Seventh Amendment standards for the re-examination of jury verdicts:

Rucker v. Fifth Ave. Coach Lines, 382 U.S. 815, Certiorari Denied; opinion below, 15 N.Y.2d 516, 202 N.E.2d 548;

United Specialty Adv. Co. v. Furr's Inc., 382 U.S. 824, Certiorari denied; opinion below, 385 S.W.2d 456;

Carter v. Winter, 382 U.S. 825, Certiorari denied; opinion below, 32 Ill.2d 275; 294 N.E.2d 755;

Mitchell v. Malvern Gravel Co., 382 U.S. 828, Certiorari denied; opinion below, 238 Ark. 848, 385 S.W. 2d 144;

Jones v. Faroni, 383 U.S. 909, Certiorari denied; unreported below. (S.Ct.Ohio);

Sule v. Missouri Pac.R.R.Co., No. 174, Oct. Term, 1966, Certiorari denied October 10, 1966; opinion below, 181 So.2d (La.Ct.App.);

Vassos v. Ornstein, No. 358, Oct. Term, 1966, Certiorari denied October 10, 1966; unreported below (From N.Y. S.Ct., A.D.);

King v. Vico Ins. Co. of St. Louis, No. 388, Oct. Term, 1966, Certiorari denied October 10, 1966; opinion below, 182 So.2d 135.

We do not claim that the contention was well taken in all or any of these cases. We do present that the question is timely, it is important and it should be answered.

It has been said that hard cases make bad law. In such instance, it appears to petitioners that this case must be a hard one indeed because it abounds with bad law. We thought it was a plain case of forgery and that neither the court nor the jury would have any trouble in seeing the defendants as wilful wrongdoers taking advantage of the very people they held themselves out to protect. It appears that we were only half right. Respondents' counsel were shrewd, indeed. They called no witnesses, waived cross-examination of the plaintiffs and alienated the jury with multitudinous objections. On appeal, they filed no propositions concerning the sufficiency of the evidence and thereby barred themselves from claiming the right to a new trial. The case was presented to the Court of Civil Appeals on an all or nothing basis.

Apparently the Court felt that $90,000 was too much even though there were separate awards of actual and exemplary damages against five defendants in favor of two different plaintiffs. Petitioners feel that the jury saw the defendants as they are and dealt with them likewise, but possibly the Court of Civil Appeals was conscience striken. If counsel planned to drive the damages up to a point where a judgment thereon would be refused, then they have played their dangerous game to perfection.

At this point, petitioners feel that anything is better than nothing. Certainly, somebody ought to be liable for something when a title company, a real estate broker and a grantee commit forgery upon the deed for a G.I. home. If the Supreme Court is not prepared to consider the claim for mental suffering because of time or policy or other

limitations, petitioners ask that certiorari be granted with respect to their claim to recover the amount of the mortgage deficiency which is their "hard money damages."

Petitioners again submit that there is no principle of state law which would discharge from liability those guilty of forgery by fiduciary. However, we would be the first to concede that the opinion of the court below leaves the matter completely up in the air. If there is any doubt in the minds of this Court whether there might be a reasonable basis for the decision of the Court of Civil Appeals, we submit that the Supreme Court can and should vacate the decision below for further proceedings and the clarification of its decision. *Minnesota v. National Tea Co.*, 309 U.S. 551.

> "A litigant is entitled to at least one tolerably fair trial regardless of the nature of his offense * * * and to this end we have made our ruling." Bird, J., in *Shawhan v. Kentucky*, 318 S.W.2d 541 (Ky. 1958)

Your petitioners ask no more.

CONCLUSION

For the reasons set forth above and in their original petition for certiorari, petitioners respectfully move for rehearing, for the grant of certiorari and for so much of the alternative relief set forth above as the Court may deem proper.

December 27, 1966

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of the Supreme Court.

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Attorney for Petitioners.